

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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UNITED STATES OF AMERICA :

-vs-

Case No. 1:09-cr-179

MIRWAIS MOHAMADI,
Defendant.

MOTIONS HEARING

May 8, 2009

Before: Liam O'Grady, Judge

APPEARANCES:

Ronald L. Walutes, Jr., and Stephanie B. Hammerstrom,
Counsel for the United States

Kevin Brehm, Counsel for the Defendant

The Defendant, M. Mohamadi, in person

1 THE CLERK: Criminal case number 1:09-cr-179, the
2 United States of America versus Mirwais Mohamadi. Counsel
3 please identify themselves for the record.

4 MR. WALUTES: Good morning, Your Honor. Ronald
5 Walutes for the United States, joined by Stephanie
6 Hammerstrom.

7 THE COURT: All right. Good morning.

8 MR. BREHM: Good morning, Your Honor. Kevin Brehm
9 on behalf of Mr. Mohamadi. He is present in court today in
10 the Marshal's custody.

11 Your Honor, I believe the purpose today is on our
12 motion asking to change and modify some of the conditions he
13 is being held under as a pretrial detainee.

14 THE COURT: Yes, sir.

15 MR. BREHM: We tried to in some respects kind of
16 streamline the issue in our response to really try to focus on
17 what are the key concerns that we have raised. The first
18 primary concern is the issue about contact with the family.

19 Then in addition to that, there are some concerns
20 about some of the restrictions in the institution where he
21 would normally, if considered a regular inmate, have certain
22 programs he could attend and other rights. And those are
23 being taken away, and that is the second issue we want to
24 address.

25 We have proposed to the Court a possible order that

1 would address these issues. The biggest concern we have at
2 this point is he has been in federal custody although he is
3 placed in a state or regional institution, but he is a federal
4 detainee.

5 We understand the Government is saying, well, but he
6 is also a sentenced state prisoner, but our concern is that
7 that in some respects is not a real factor because even in the
8 state system if he was to go to one of the Virginia state
9 prisons, he is going to start off with the rights that we are
10 asking for even as a state-sentenced prisoner. And those
11 rights would only be taken away if he is has some conduct in
12 the institution where he is sent that would allow them through
13 disciplinary procedures to take away that these rights.

14 THE COURT: Well, what do you want that he doesn't--
15 I mean, he is a state prisoner. He has demonstrated, at least
16 to this stage with the evidence that I have looked at, that he
17 will use anyone and anything at his disposal to try and avoid
18 a successful prosecution for the charges against him, and that
19 in part has led to more charges against him. And he has
20 demonstrated that he really deserves absolutely nothing more
21 than the minimal constitutional requirements while he is a
22 state prisoner in the custody of the federal system.

23 So, tell me what you don't have and that you believe
24 is a constitutional deprivation because I don't think that Mr.
25 Mohamadi deserves any more than, frankly, he has right now.

1 MR. BREHM: Well, I think what's first most obvious
2 is that he is being denied any contact with the family.

3 THE COURT: Well, he is using his family to further
4 criminal behavior. How do you propose allowing family contact
5 and not further his criminal behavior?

6 MR BREHM: Well, our contention is he has not used
7 the family to further--

8 THE COURT: Well, they have got calls to the sister
9 urging her to falsify documents.

10 MR. BREHM: Well, first of all, we contest the
11 accuracy of that allegation. But more importantly for
12 purposes of the restrictions on contact with family, that has
13 absolutely nothing to do with any of the allegations in the
14 indictment as to trying to affect the prosecution.

15 THE COURT: Doesn't the institution have a right to
16 prevent future crimes as well and other crimes?

17 MR. BREHM: Well, Your Honor, as we made fairly
18 clear, we don't in any way suggest that the contact with the
19 family would be unsupervised. We know and we would anticipate
20 that it would be extremely carefully monitored, supervised.
21 Correspondence from him to family and from them to him would
22 be reviewed before it was allowed to go in and out. Phone
23 calls are going to be recorded, they are going to be
24 monitored.

25 The Court could certainly, as we suggest, require,

1 it wouldn't be unusual, that verbal communications be only in
2 English and not any other foreign language. So, that's easy
3 for the Court to establish.

4 And as far as visits, if there are personal visits,
5 they are normally regulated anyway for almost any inmate.

6 And so, there are certainly means that they could
7 have-- There would be no contact visits and there could be
8 means to supervise the visits.

9 So, what we are simply suggesting is as to the
10 immediate family, we are not talking about anyone beyond that,
11 he should be able to have these basic rights of contact that
12 we understand will be heavily supervised and monitored, but he
13 still should have those.

14 And what I think is somewhat ironic, apparently even
15 in the Northern Neck Regional Jail's inmate manual, I would
16 proffer they have certain classifications for their special
17 housing, one of them is administrative segregation, and that's
18 usually to be applied to individuals who might be deemed
19 dangerous or charged with very serious crimes. Even under
20 their procedures at Northern Neck, in administrative
21 segregation you still have the substantial rights including
22 the family contact rights.

23 And then there is a more elevated form of housing
24 which is called punitive detention, and that's when someone
25 actually has committed some violation in the institution and

1 there has been some kind of process for determining that that
2 violation occurred. And even in Northern Neck's own manual
3 and their procedures, even if you are elevated to punitive
4 detention, you are still at least allowed correspondence to go
5 in and out.

6 So, what we have got here is going even beyond that,
7 an extreme of total prohibition of family contact. That's
8 something that even I think in cases like the Moussaoui case
9 there was some provisions for family contact. We are just
10 going well beyond what this case would justify.

11 And again, our request is very, in some respects
12 very narrow and limited. We are asking for family contact
13 with immediate family which could be very strictly monitored
14 and supervised, and we don't in any way dispute that.

15 And then in addition to that, we are just simply
16 asking that, not necessarily that the administrative
17 segregation, not that all those conditions be removed, but
18 that he at least get some of the basic rights that people in
19 administrative segregation get. That's going to include the
20 ability to participate in religious programs like church or
21 Bible studies. Some time out of the cell for recreation,
22 basic recreation, even though that might be limited to his not
23 being able to interact with other inmates, he would still have
24 a chance to be out of his cell for a certain number of hours
25 per day and per week.

1 THE COURT: And the jail doesn't disagree with you
2 there, they say he is going to get that, right?

3 MR. BREHM: Well, no, that's the problem. They have
4 had said on the one hand, the Marshals seem to acknowledge--
5 And again, it is the Marshals that are putting the
6 restrictions on. Again, this is beyond what the jail would
7 normally do for their own inmates, that's one of the points we
8 are making. And what the Marshals have said is, well, he has
9 a right to a certain amount of rec time, but apparently, and I
10 would proffer he is still not getting even that, even though
11 that is even less than what Northern Neck would normally
12 provide.

13 So, we are simply asking for lifting some of these
14 restrictions that are still in no way going to impact the risk
15 to the security of the institution, to the security of others.
16 Again, we are not asking him to be treated like an inmate in
17 general population. We are trying to be reasonable in our
18 request to narrowly focus it to what would seem to me to be
19 more nonpunitive. Because one of the concerns is at this
20 point, especially as a pretrial detainee not being convicted
21 on this case, and certainly we are challenging these
22 allegations and we will be going to trial to fight these
23 allegations, in a sense by adding restrictions on to him that
24 Northern Neck would normally not impose, simply has to be
25 punitive. Because Northern Neck, they would have their own

1 restrictions for administrative and security purposes, and
2 this goes well beyond that. So, it has to be punitive.

3 And then for the Government to say, well, here are
4 two Second Circuit cases from years ago that say a
5 state-sentenced prisoner isn't to be given the rights of a
6 pretrial detainee, first of all, I don't know that applies in
7 this situation because those cases had nothing to do with this
8 situation. One case was a 1983 action where well after the
9 period of incarceration the inmate was bringing a lawsuit and
10 there was a summary judgment issue.

11 And the other one was a Fourth Amendment issue where
12 inmates had been convicted of a federal crime and said, our
13 conversations were recorded. And the Court there said, the
14 Willoughby case that the Government cites, the Court there
15 said it doesn't really matter whether you are a pretrial
16 detainee or a sentenced prisoner, you don't have a privacy
17 right in an institution to your conversations with other
18 inmates.

19 So, those cases don't apply here. The point is,
20 even as a state prisoner, he is entitled to these rights.

21 THE COURT: I understand.

22 MR. BREHM: That's what we are asking for.

23 THE COURT: Okay, let me hear from the Government.

24 MR. WALUTES: Your Honor, there is also an Eighth
25 Circuit case I neglected to include in my reply that is cited

1 within the Second Circuit case.

2 In the Second Circuit case, first off, there is an
3 institutional knowledge. When a person harms a staff member
4 or commits a violation, they moved him from the Southern
5 District of New York Metropolitan Regional Jail, which is
6 federal, to a more enhanced security institution. He didn't
7 get to start over in that new institution. He was placed in
8 very severe restrictions in the Second Circuit case.

9 They say that if he is serving a state sentence, he
10 is a convicted prisoner. And then that leaves him with only
11 two constitutional concerns, Your Honor, that I would
12 articulate at this point. One is the Sixth Amendment right to
13 counsel, which the parties are in agreement there is no
14 barrier to.

15 The second is an Eighth Amendment right relating to
16 unreasonable punishment. Your Honor, here there is nothing
17 being done other than attempting to freeze the status quo
18 until we can try this case next month. The Government resents
19 the reference to Moussaoui. Moussaoui was trying to plead
20 guilty. He was not in any fashion doing anything to harm a
21 witness.

22 This defendant has done everything under his power
23 to kill a witness before his trial and avoid trial. If he is
24 convicted on these charges, he is very likely to spend the
25 rest of his life in jail.

1 Bell, which the Government doesn't believe applies,
2 but even if we for sake of argument use Bell, Bell says that
3 federal prisoners who are detained-- And I would note,
4 defense counsel attached last night the Court's detention
5 order. The Court explicitly found, there is reason, that
6 there is a serious risk this defendant will endanger the
7 safety of another person or the community.

8 The statute has added that language because the
9 federal courts recognize that that was a very serious category
10 of case. And this defendant under this indictment squarely
11 fits within it.

12 Your Honor, I would note monitoring is absolutely
13 useless. And the best example of that-- Even monitoring of
14 English language communications. Yesterday I sat at my desk
15 and I read the defense counsel's motion that is docketed in
16 June on venue. He attached the identity of the second victim
17 in this case, which to the date had not yet attempted to be
18 killed. As an attachment, he puts the victim's vehicle, the
19 make, model, year, color and tag number.

20 Now, I wonder if the defense counsel knew when he
21 put that on the Internet whether or not she is currently using
22 that vehicle. The truth is she is not. But, Your Honor, I
23 monitored that conversation, but I could not stop the passage
24 of that very risky information now onto the public domain.
25 Monitoring does not protect the Government's concerns.

1 The defendant must prove that the restrictions are
2 arbitrary and capricious. Your Honor, he cannot. Under this
3 indictment, probable cause having already been made, the
4 restrictions on this defendant are reasonable and appropriate.

5 His family has attempted to alter public documents.
6 They have flagged witnesses going before the federal grand
7 jury. He is a registered gangster in the jails in Virginia.
8 And he is referring to people he is calling who are out in the
9 community and still out in the community today. One of his
10 friends is currently incarcerated for murder, but the others
11 are all there, Your Honor, and he tells them, keep it
12 gangster.

13 Your Honor, that is the concern. We cannot realtime
14 and the jail should not be asked realtime to monitor this
15 defendant's communications. And his family has proved, even
16 his mother, even his sister, their willingness to do as
17 instructed at his wishes.

18 Your Honor, we believe the defendant's motion, and
19 it is his burden, fails.

20 THE COURT: So, after conferring with the jail, you
21 still don't believe the family visits under any circumstances
22 would be secure?

23 MR. WALUTES: I do not, Your Honor. I will tell the
24 Court that I brought today Investigator Burnham with some
25 thirty-plus years of law enforcement experience who is the one

1 who first spotted the defendant's prostitution activities
2 within the jail, and that caused the monitoring to elevate on
3 this defendant, and subsequently identified the attempts to
4 kill witnesses and other very severe obstruction of federal
5 grand jury proceedings.

6 The problem, Your Honor, with putting witnesses on
7 the stand, and that's why I hesitate to do it, is all it does
8 is, frankly, educate this defendant as to how he was caught
9 and allows him then to circumvent it.

10 I will also inform the Court that I asked the
11 Marshals to have Major Hall available should the Court wish.
12 He is not available until 10. I asked that he still come in
13 case the Court had concerns.

14 But, Your Honor, I do not believe given the history
15 of this defendant-- It is not a situation where we don't know
16 the family and we could presume them to act in appropriate
17 behavior. Your Honor, here-- And this is another point I
18 should articulate, Your Honor. We don't know who his mother
19 three-wayed him to when he should have been talking to a
20 lawyer. Alexandria does not record the attorney lines.
21 Fairfax does. And we will come later to the Court for an
22 order seeking those telephone calls, but we'll defer that to
23 another day. Alexandria doesn't record them.

24 The only thing we know is that on recorded calls
25 after Alexandria caught him using the attorney line

1 inappropriately, he tells his mother to change her number
2 because it's now blocked. She is three-waying him. We don't
3 know to who and we don't know what was said on that. Still
4 today, Your Honor, I do not know. And that is a serious
5 concern under these facts.

6 THE COURT: Okay. All right, thank you.

7 MR. BREHM: Just briefly, Your Honor. First of all,
8 I don't know about any of these allegations that weren't
9 raised in their brief about some gang aspects, things of that
10 nature and communicating to people outside. Again, we are--

11 THE COURT: The conversation with the mother
12 three-waying a call is a--

13 MR. BREHM: I haven't seen any evidence about that.

14 THE DEFENDANT: She doesn't--

15 MR. BREHM: Excuse me, excuse me.

16 THE COURT: You need to talk to your counsel? Take
17 a moment and talk to him.

18 MR. BREHM: I don't need to, Your Honor. The
19 Government's brief, the Government's brief, that's one of the
20 problems. They have all had all this time to lay out specific
21 allegations about the family, and look what little that they
22 have told this Court. Nothing of any connection--

23 THE COURT: What do I need more than the fact he is
24 that using an attorney line in the jail with his mother's
25 cooperation to bring in a third party who is unknown to the

1 Government?

2 MR. BREHM: Well, we contest that. We don't know
3 what the attorney line aspect is. All I know from their
4 allegation here is that a number was being blocked, which is
5 apparently a number to the mother. And there was an
6 allegation that he communicated to the mother to change the
7 number so he could speak with her. There is no allegation in
8 there that that contact with the mother then went on to
9 somebody else.

10 THE COURT: He encouraged the mother to change her
11 number so that it wouldn't be a number that was familiar to
12 the jail and it wouldn't be blocked automatically.

13 MR. BREHM: Okay.

14 THE COURT: I understand your argument. Your motion
15 is denied. I find that the Government has not acted
16 arbitrarily and capriciously, nor has the jail in limiting
17 severely, I agree with you, the contact that Mr. Mohamadi can
18 have with the outside world.

19 It is a limitation in every respect that he has
20 earned based on the evidence that I have reviewed to date by
21 his continuing criminal behavior, his engagement with others,
22 including several family members, in that unlawful conduct.
23 And he is presently without these restrictions an extremely
24 dangerous person to the community, including witnesses who may
25 potentially testify against him. And that the restrictions

1 are reasonable and they don't violate his Sixth or Eighth
2 Amendment constitutional rights.

3 Your exception is noted, Mr. Brehm.

4 MR. WALUTES: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. BREHM: Your Honor, Mr. Mohamadi wants me to
7 mention to the Court he would like to file a motion that he
8 wants to represent himself pro se from this point on. So, we
9 will file the necessary motion so he can address that with the
10 Court.

11 THE COURT: Certainly, Mr. Brehm. Well, we will
12 hear your motion on that, Mr. Mohamadi, when it is noticed. I
13 notice there is a motion for-- Is there any objection to
14 extending the deadline for filing of pretrial motions?

15 MR. WALUTES: Not at all, Your Honor.

16 THE COURT: Okay, I will enter that order. It may
17 have to be further modified. But also that there is a venue
18 motion that has been filed, and we will deal with that.

19 Mr. Mohamadi, probably the most ill-advised thing
20 you could do would be to represent yourself in these
21 proceedings. You have a very experienced counsel who is an
22 extraordinary advocate, and you are not going to get any
23 better legal representation.

24 THE DEFENDANT: Your Honor--

25 THE COURT: I am just giving you, this is a lecture,

1 and we will have a conversation next time properly after
2 briefs have been filed.

3 THE DEFENDANT: Yes, sir.

4 THE COURT: I will hear your argument. But I am
5 just telling you in advance, I know that you have been
6 involved in the criminal justice system and you may have had
7 in the past many different court-appointed counsel and you may
8 not have been happy with them. You are now in a system where
9 the Federal Public Defender service has the best advocates in
10 Virginia here working on behalf of defendants. And you are
11 going to be well served in having representation, and poorly
12 served in representing yourself.

13 So, I want you to think about that before filing
14 your motion. All right.

15 THE DEFENDANT: How can we argue when this guy is
16 just making broad allegations that he bases off of--

17 THE COURT: But I have ruled. Mr. Brehm has filed a
18 motion. It is an excellent motion--

19 THE DEFENDANT: He is just making broad accusations
20 without giving me an opportunity to defend myself against
21 them. He has already tainted everyone's minds, your mind with
22 all these broad accusations and statements that he just put
23 together with him, Mr. Burnham and Ms. Castro orchestrating
24 this whole case from the jail.

25 THE COURT: Okay. And that will--

1 THE DEFENDANT: And all this stuff, I haven't
2 threatened anyone. I haven't harmed anyone. No has been
3 physically harmed, no one has even received a physical threat
4 from me in any shape, way, form or fashion. All I have been
5 trying to do is defend myself.

6 THE COURT: I understand that.

7 THE DEFENDANT: And the only limited-- My mother
8 doesn't even know how to make a three-way call.

9 THE COURT: Okay, we're done.

10 THE DEFENDANT: That's all I am saying. I don't
11 understand, there is no proof behind 80 percent of this
12 stuff--

13 THE COURT: They represent that they have the--

14 THE DEFENDANT: He has got one jailhouse
15 conversation--

16 THE COURT: All right, you're done, we're done for
17 today. I have made my ruling and we are done for today.

18 THE DEFENDANT: I apologize if I am being rude.

19 THE COURT: No, I understand.

20 THE DEFENDANT: I am just disturbed about this
21 whole--

22 THE COURT: Your freedom is at stake and I
23 understand why you are emotional about it.

24 THE DEFENDANT: I just want you to understand, if I
25 had actually done something--

1 THE COURT: I understand.

THE DEFENDANT: It is just a little outrageous.

3 MR. BREHM: Thank you, Your Honor.

4 THE COURT: Yes, Mr. Brehm, thank you.

HEARING CONCLUDED

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I certify that the foregoing is a true and

accurate transcription of my stenographic notes.

/s/

Norman B. Linnell, RPR, CM, VCE, FCRR